No. 89-474 (6)

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY,

Petitioner,

vs.

THOMAS J. CORBIN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR PETITIONER

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Question Presented

Whether, within the constraints of the double jeopardy clause of the Fifth Amendment, a motorist who causes the death of another person as the result of an automobile collision can be subject to prosecution for homicide, notwithstanding the fact that at the scene of the collision, and prior to the other operator's death, respondent received uniform traffic tickets for Driving While Intoxicated and Failure to Keep to the Right and subsequently entered guilty pleas to those accusatory instruments and was sentenced.

Parties

In the New York State Court of Appeals and the Appellate Division, Second Judicial Department the parties were Thomas J. Corbin and Judith A. Hillery, as Judge of the County Court, Dutchess County and William V. Grady, as District Attorney of Dutchess County. Judith A. Hillery, Judge of the County Court, who was represented by the New York State Attorney General, elected not to appear in either proceeding. In the County Court of Dutchess County the only parties were the People of the State of New York, represented by William V. Grady, District Attorney of Dutchess County and Thomas J. Corbin.

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No. 89-474

IN THE

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OCTOBER TERM, 1989.

WILLIAM V. GRADY, District Attorney of Dutchess County,

Petitioner,

against

THOMAS J. CORBIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR PETITIONER

The District Attorney of Dutchess County, on behalf of the People of the State of New York, seeks reversal of a judgment of the New York State Court of Appeals. By that judgment, the Court of Appeals, by a divided Court (4-2) reversed a judgment of the New York State Supreme Court, Appellate Division, Second Judicial Department, which dismissed an application to prohibit prosecution on an indictment.

Opinions Below

The opinion of the New York State Court of Appeals which was entered on July 13, 1989, is reported at 74 N.Y. 2d 279, 543 N.E.2d 714, 545 N.Y.S.2d 71 and appears at page 1a *et seq.* of the Petition for Certiorari. The Order of the Appellate Division, Second Judicial Department, dismissing an application to prohibit prosecution is unreported and is set forth at page 1b *et seq.* of the Petition for Certiorari. The opinion of the County Court denying respondent's motion to dismiss the indictment is also unreported and appears at page 1c *et seq.* of the Petition for Certiorari.

Jurisdiction

The judgment of the New York Court of Appeals was entered on July 13, 1989. The Petition for a Writ of Certiorari was filed on September 11, 1989, and this Court granted the Petition on November 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Constitutional and Statutory Provisions Involved

Statutory provisions involved are set forth in the Appendix to this brief.

Statement Of The Case

At approximately 6:35 p.m. on October 3, 1987, while respondent was operating a motor vehicle in a westbound lane on a state highway, he drove his vehicle into the eastbound lane of traffic and struck the rear view mirror of a vehicle. He then continued into the eastbound lane striking a second vehicle operated by Brenda Dirago and occupied by Daniel Dirago. At the time of the impact there was a moderate to heavy rainfall; the respondent was travelling

at forty-five (45) miles per hour and respondent's vehicle was nine (9) feet into the eastbound lane and there was an overlap of approximately two (2) feet between the left front of the Dirago vehicle and the left front of respondent's vehicle. J.A. 19.[1]

That evening the respondent was issued two uniform traffic tickets accusing him of one misdemeanor, Driving While Intoxicated (New York State Vehicle and Traffic Law Section 1192(3), and one traffic infraction, Failure to Keep Right (New York State Vehicle and Traffic Law Section 1120(a). J.A. 3-4.

After the respondent's arrest, an Assistant District Attorney was called to the scene by the police to prepare a search warrant for the seizure of a sample of respondent's blood, if necessary. No search warrant was prepared because the respondent consented to taking a blood test to determine the level of alcohol in his blood. Pet. 4c. The Assistant District Attorney then left the scene. Later that evening Mrs. Dirago died as a result of injuries sustained in the automobile collision. J.A. 19.

The uniform traffic tickets issued on the night of October 3, 1987, were returnable in the local criminal court on October 29, 1987. J.A. 3-4. However, that Court later advanced the return date to October 27, 1987. In doing so, the Court notified the respondent, but not the prosecutor. App. A11.

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[1] J.A. refers to the Joint Appendix. Pet. refers to the Petition for a Writ of Certiorari. App. refers to the Appellant's Appendix which was filed in the New York State Court of Appeals. T. refers to the transcript of the County Court Double Jeopardy Hearing which is included in the Appellant's Appendix filed with the New York State Court of Appeals.

On October 14, 1918, an Assistant District Attorney who had received the District Attorney's file on the misdemeanor and traffic infraction charges, but who had no knowledge of Mrs. Dirago's death, mailed to the defendant copies of a statement of readiness for trial, (N.Y.C.P.L. Section 30.30) a notice of intent to use defendant's statements made to a public servant, (N.Y.C.P.L. Section 710.30) a supporting deposition for the Driving While Intoxicated charge (N.Y.C.P.L. Section 100.25) and a DWI foundation report. J.A. 5-10. Those documents, however, were never filed with the local criminal court. T. 114-16, 143.

On October 27th the respondent and counsel appeared before the local criminal court and respondent entered pleas of guilty to the two offenses charged in the uniform tickets. J.A. 11. At the beginning of the plea inquiry the Court asked the following question and received the following response:

> Judge: Have you contacted ADA's office?
>
> Attorney: Yes. We have received papers. We have also discussed this matter with Mr. Corbin.

(J.A. 11) At the time the court accepted the pleas the Judge was not aware that the case involved an automobile accident or a death. T. 111. Since no prosecutor was present at the time the guilty pleas were entered, and no prosecutor had been scheduled to appear that night, the Court adjourned the matter for sentencing until November 17, 1987. On November 17th the respondent was sentenced to the usual sentence imposed on a first-time Driving While Intoxicated offender, *i.e.*, a Three Hundred Fifty Dollar ($350.00) fine, and a conditional discharge to attend the New York State Vehicle and Traffic Law Article 21 School; the respondent's license was suspended and he was given a

twenty (20) day conditional license. J.A. 32. At the time of sentencing neither the Assistant District Attorney who was present nor the Court knew that the case involved a fatal automobile collision. T. 114, 121-22, 153.

In the meantime, on October 30, 1987, the District Attorney had received the results of respondent's October 3rd blood test which indicated that respondent had a blood alcohol level of .19 percent. T. 54-55; J.A. 20. Also, the prosecutor assigned to investigate the fatality sent a letter to defendant's attorney dated November 12, 1988, indicating that the vehicles involved in the collision had been inspected "in preparation for the Grand Jury proceeding" and were available for inspection by the defense. App. A16.

In early January 1988 the District Attorney received the report of an accident reconstructionist, which had been commissioned in early October 1987. T. 83-84. A Grand Jury was then impanelled and an Indictment dated January 19, 1988, was returned accusing respondent Corbin of one count of Manslaughter in the Second Degree (in violation of New York State Penal Law Section 125.15); two counts of Vehicular Manslaughter in the Second Degree (in violation of New York State Penal Law Section 125.12, Subdivisions 1 and 2); one count of Criminally Negligent Homicide (in violation of New York State Penal Law Section 125.10); one count of Assault in the Third Degree (in violation of New York State Penal Law Section 120.00, Subdivision 2); one count of Operating a Motor Vehicle While Under the Influence of Alcohol (in violation of New York State Vehicle and Traffic Law Section 1192, Subdivision 2) and one count of Operating a Motor Vehicle While Under the Influence of Alcohol (in violation of New York State Vehicle and Traffic Law Section 1192, Subdivision 3). J.A. 13-17.

In County Court the respondent sought dismissal of the Indictment in part on the ground that prosecution under the

Indictment was barred by his prior pleas of guilty to Driving While Intoxicated and Failure to Keep Right. After a hearing, the County Court denied the motion. Pet. 1c *et seq.* The Court relied on N.Y.C.P.L. 40.30(2)(b), which provided for an exception to the general statutory protection against successive prosecutions where the previous prosecution "was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendants without the knowledge of the appropriate prosecutor, for the purpose of avoid prosecution for a greater offense." The Court found that respondent's counsel had misrepresented the facts at the October 27th plea allocution and that these misrepresentations obviated respondent's statutory protection against double jeopardy. Pet. 8c-9c. In addition, the Court relied on Section 1800 (d) of the New York Vehicle and Traffic Law, which provides explicitly that:

> a conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or a motor cycle.

Pet. 9c.

The respondent then commenced a proceeding pursuant to New York State Civil Practice Law and Rules Article 78 in the nature of prohibition seeking to prevent the County Court and the District Attorney from proceeding with his prosecution on the ground that such prosecution was barred by the double jeopardy clause of the United States Constitution. The Appellate Division dismissed the proceeding without opinion. Pet. 1b *et seq.*

The respondent then appealed to the New York State Court of Appeals. That Court reversed the order of the Appellate Division. The majority of the Judges, relying on

this Court's dicta in *Illinois v. Vitale*, 447 U.S. 410 (1980), concluded that the double jeopardy principles of the Federal Constitution precluded prosecution under this Indictment. Pet. 1a-14a.

In reaching its conclusion, the Court resolved a number of state law issues. The Court held that N.Y.C.P.L. Section 40.30(2)(b) was inapplicable because the traffic-ticket guilty pleas were not "procured without the knowledge of the prosecution." Pet. 6a-9a. In addition, the Court found that the two misdemeanor counts included in the seven count indictment were barred by the general New York statutory double jeopardy provision, which prohibits successive prosecutions arising out of the "same transaction."[2] Pet. 13a.

Prosecution of the remaining five counts appeared to be permitted by state law, since Section 1800(d) provided express authority to prosecute "homicide" or "assault" charges even after a conviction for a traffic offense. Pet. 10a. Therefore, the Court had to determine whether Section 1800(d) was constitutional as applied to this case.

To decide whether the Double Jeopardy Clause would thus bar this prosecution, the Court turned to the familiar rule of *Blockburger v. United States*, 284 U.S. 299, 304 (1932), that two offenses are not "the same" if "each provision requires proof of fact which the other does not." Quoting *Illinois v. Vitale*, 447 U.S. 410, 416 (1980), the Court recognized that the *Blockburger* test "focuses on the

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[2]These two counts charged respondent with driving while intoxicated in violation of N.Y. Vehicle & Traffic Law Section 1192(3)—the precise provision to which he had already pled guilty—and a companion provision prohibiting driving a car with a blood alcohol count of .10% or greater, *id.* Section 1192(2). The Court held that Section 1192(2) and Section 1192(3) were "linguistically different," see Pet. 13a n.7, but "indistinguishable." Pet. 13a.

proof necessary to prove the statutory elements of each offense rather than on the actual evidence to be presented at trial." Pet. 11a.

The Court apparently believed that, under this "traditional" *Blockburger* test, Pet. 12a n.7, three of the five remaining offenses—reckless manslaughter, criminally negligent homicide, and third-degree reckless assault—would not be held to be the "same offense" as those to which respondent had pleaded guilty. Each of these offenses requires an element—death or injury to a person—that is not required under either of the traffic misdemeanors to which respondent had pleaded guilty. In turn, the traffic-ticket misdemeanors to which respondent had pleaded guilty required an element—operation of a motor vehicle—that is not required for conviction of any of these three offenses.[3]

[3]Two of the five homicide or assault offenses—those charging second degree vehicular homicide—were held to be barred even under the "traditional" *Blockburger* test. Pet. 12a n.7. Although the discussion is not altogether clear, the Court appears to have reached this result on the basis of a conclusion that driving while intoxicated, in violation of Section 1192(3), to which respondent pled guilty, and Section 1192(2), with which he was not charged, were "the same offense" as each other and both were "lesser included offenses" of second-degree vehicular homicide. In the Court's terms, a second-degree vehicular homicide was "in essence, the crime of criminally negligent homicide * * * with driving while intoxicated in violation of Vehicle and Traffic Law Section 1192(2) or (3) as an aggravating factor." *Id.* In addition, the "proof necessary to establish the 'driving while intoxicated' elements" of a Section 1192(2) vehicular homicide and a Section 1192(3) vehicular homicide is "the same." Therefore, counts two and three of the indictment—which charged vehicular homicide with Section 1192(2) and Section 1192(3) as aggravating factors, respectively—were the same as each other under a "traditional" *Blockburger* test. Finally, because the traffic-ticket offense to which respondent had pleaded guilty—Section 1192(3) itself—was a lesser included offense of both counts two and three under that same test, counts two and three were both barred in accordance with this "traditional" *Blockburger* analysis.

Relying on what it termed a "pointed dictum" from *Illinois v. Vitale*, 447 U.S. 410, 421 (1980), *see* Pet. 11a, the Court nonetheless found that the prosecution on the homicide and assault charges was barred by the Double Jeopardy Clause. The majority held that *Vitale* required, in addition to the customary *Blockburger* test focusing on the statutory elements of the two crimes, a further inquiry into the actual proof to be presented at trial. In this case, the prosecution had "affirmatively stated in its bill of particulars that it intends to use the acts underlying [the traffic offenses to which respondent had pleaded guilty] as the major part of its proof on the reckless and negligence elements of the former crimes." Pet. 12a. Therefore, because, according to the Court, "the prosecution will rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges," prosecution of the latter charges is "constitutionally prohibited." Pet. 12a.

Speaking for the two dissenting Judges, Chief Judge Wachtler stated:

> It devalues the double-jeopardy clause of the Fifth Amendment of the Federal Constitution when a defendant, unquestionably intoxicated at the time his auto struck and killed a person, avoids a homicide prosecution by actively misleading a justice of the peace into believing that no accident occurred, and no one was killed.

Pet. 14a.

The dissenters did not reach the constitutional double jeopardy issue, finding that the respondent had procured his prosecution for the traffic offenses by misleading the local criminal court judge. Since the respondent had engaged in a "fraudulent scheme" to avoid prosecution for the greater

offense, prosecution for the homicide was permitted pursuant to N.Y.C.P.L. 40.30(2)(b). Pet. App. 14a-15a.

Summary of Argument

In *Blockburger v. United States*, 284 U.S. 299, 304 (1932) this Court held that:

> . . . [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

This "same offense" *Blockburger* statutory analysis should not now be abandoned or expanded.

Under New York Law Manslaughter in the Second Degree and Criminally Negligent Homicide necessarily involve death as an element of the crime. Similarly, Assault in the Third Degree involves physical injury as an element of the crime. Neither of these homicide charges nor the assault charge requires proof of a particular instrumentality of the crime or that the defendant was intoxicated. On the other hand, Driving While Intoxicated and Failure to Keep Right can only be committed by the operator of a motor vehicle and do not necessarily involve death or physical injury. Thus there is a lack of mutuality in the elements of the various crimes and they are not the "same offense" for purposes of constitutional double jeopardy analysis.

Consequently, the petitioner submits that the New York State Court of Appeals erred in prohibiting prosecution on the indictment and the case should be reversed and remanded.

Argument

The New York State Court of Appeals Erred In Its Interpretation of This Court's Rulings and Respondent's Prosecution for Manslaughter, Criminally Negligent Homicide and Assault Should Continue.

The majority of the New York Court of Appeals, relying on this Court's statements in *Illinois v. Vitale*, 447 U.S. 410, 421 (1980) clearly ruled that prosecution for Manslaughter in the Second Degree, Criminally Negligent Homicide and Assault in the Third Degree under the first, fourth and fifth counts of the indictment were prohibited by the Fifth Amendment double jeopardy provisions (Pet. 11a-12a) which are made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 796 (1969). The petitioner contends that this expansive interpretation of double jeopardy protections is inconsistent with this Court's prior rulings. *See Iannelli v. United States*, 420 U.S. 770, 785 N.17 (1975); *Gavieres v. United States*, 220 U.S. 338, 343-44 (1911).

Twenty years ago this Court specifically recognized that the Fifth Amendment double jeopardy guarantee involved three separate protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnote omitted). *Accord Garrett v. United States*, 471 U.S. 773, 777 (1985); *Illinois v. Vitale*, 447 U.S. 410, 415 (1980).

The issue in the instant case is whether the homicide and assault counts, which could be prosecuted pursuant to New York State Vehicle and Traffic Law Section 1800(d) are the "same offense" as Driving While Intoxicated and Failure to Keep Right, the vehicle and traffic offenses to which respondent entered guilty pleas. The respondent submits that they are different offenses.

In *Blockburger v. United States, supra,* 284 U.S. at 304 this Court stated:

> . . . [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Gavieres v. United States,* 220 U.S. 338, 342 (1911) and authorities cited. In that case this Court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth,* 108 Mass. 433 (1871); "a single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

This is a technical test focusing on the statutory elements; it is not concerned with an overlap, even a substantial overlap, in the proof on which the prosecution relies to establish the elements of the offenses. *Iannelli v. United States, supra,* 420 U.S. at 785 N.17.

Here, on October 27, 1987, respondent entered pleas of guilty to the misdemeanor of Driving While Intoxicated (New York State Vehicle and Traffic Law Section 1192, Subdivision 3) and the traffic infraction of Failure to Keep

Right. New York State Vehicle and Traffic Law Section 1120, Subdivision a. In order to establish respondent's guilt of Driving While Intoxicated in violation of Section 1192, Subdivision 3, the prosecution would have to establish that the respondent operated a motor vehicle, (*i.e.,* a vehicle operated on a public highway which is propelled by power other than muscular power (New York State Vehicle and Traffic Law Section 125)), while in an intoxicated condition. The New York State Court of Appeals has ruled that a driver is intoxicated when

> he has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

People v. Cruz, 48 N.Y.2d 419, 428, 399 N.E.2d 513, 423 N.Y.S.2d 625, 629 (1979), appeal dismissed 446 U.S. 901 (1980). In order to establish a defendant's guilt of Failure to Keep Right, the prosecution would have to establish that the defendant was operating a motor vehicle on a road of sufficient width and failed to keep his vehicle on the right half of the roadway. Therefore, both offenses to which appellant entered pleas of guilty required the prosecution to establish as an element of the offense that the appellant was operating a motor vehicle.

On the other hand, neither the homicide nor the assault counts in the indictment require the prosecution to establish operation of a motor vehicle as an element of the crime.

Specifically, in order to establish Manslaughter in the Second Degree in violation of New York Penal Law Section 125.15, the prosecution would have to establish that the respondent recklessly caused the death of another, *i.e.,* that the defendant was aware of and consciously disregarded a

substantial and unjustifiable risk that a death would occur (New York Penal Law Section 15.05, Subdivision 3) and that another person died as a result of the respondent's conduct. Under the *Blockburger* test Manslaughter in the Second Degree, as charged in the first count of the indictment, is not the same offense as Driving While Intoxicated or Failure to Keep Right. The Driving While Intoxicated and Failure to Keep Right statutes require proof that the defendant was operating a motor vehicle; that is not a statutory element of the crime of Manslaughter in the Second Degree. On the other hand, Manslaughter in the Second Degree requires proof of a death; Driving While Intoxicated and Failure to Keep Right do not. Therefore, under traditional double jeopardy analysis, the prosecution for Manslaughter in the Second Degree should be permitted.

Under the fourth count of the indictment the respondent is charged with Criminally Negligent Homicide. In order to establish his guilt of that offense, the prosecution must establish that respondent, with criminal negligence, caused the death of another person. New York Penal Law Section 125.10. This would require that the prosecution prove that the respondent failed to perceive a substantial and unjustifiable risk that a death would result (New York Penal Law Section 15.05, Subdivision 4) and that he caused the death. Here too, under the *Blockburger* test, Criminally Negligent Homicide, as charged in the fourth count of the indictment is not the same offense as Driving while Intoxicated and Failure to Keep Right. The Driving While Intoxicated and Failure to Keep Right statutes require proof that the respondent operated a motor vehicle and was intoxicated. These are not statutory elements of Criminally Negligent Homicide. On the other hand, Criminally Negligent Homicide requires proof of a death which Driving While Intoxicated and Failure to Keep Right do not. Therefore, under the traditional double jeopardy analysis, prosecution for

Criminally Negligent Homicide under the fourth count of the indictment should be permitted.

Under the fifth count of the indictment the respondent was accused of Assault in the Third Degree in violation of New York Penal Law Section 120.00, Subdivision 2. In order to establish respondent's guilt of that crime the prosecution was required to prove that the respondent recklessly caused physical injury to another person, *i.e.*, that the respondent was aware of and consciously disregarded a substantial risk that another person would sustain physical injury (New York Penal Law Section 15.05, Subdivision 3) and that other person suffered an "impairment of physical condition or substantial pain" (New York Penal Law Section 10.00, Subdivision 9) as a result of the defendant's acts. Under the *Blockburger* test Assault in the Third Degree, as charged in the fifth count of the indictment is not the same offense as Driving While Intoxicated or Failure to Keep Right. The Driving While Intoxicated and Failure to Keep Right statutes require proof that the defendant was operating a motor vehicle; that is not a statutory element of the crime of Assault in the Third Degree. On the other hand, Assault in the Third Degree requires proof that a person sustained physical injury; Driving While Intoxicated and Failure to Keep Right do not. Therefore, under traditional double jeopardy analysis, the prosecution for Assault in the Third Degree under the fifth count of the indictment should be permitted.

This Court's ruling in *Vitale* does not require a different conclusion. In *Vitale* the juvenile respondent had struck two small children while operating a motor vehicle. One child died shortly after the collision and the other died the following day. At the scene of the accident, on November 24, 1974, the respondent was issued a traffic citation charging him with failure to reduce speed to avoid an accident. On December 23, 1974, he entered a plea of not guilty to that

charge, was tried, convicted and sentenced to pay a fine of Fifteen Dollars ($15.00). On December 24, 1974, an instrument was filed accusing respondent of two counts of Involuntary Manslaughter. Specifically, he was accused of recklessly driving a motor vehicle and causing the death of two children. *Illinois v. Vitale, supra,* 447 U.S. at 411-12. In evaluating the respondent's contention that his manslaughter prosecution was barred by double jeopardy principles, this Court held:

> . . . [I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere possibility that the state will rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the later prosecution.

Id. at 419. That holding should be controlling here.

In *Vitale* this Court also stated:

> By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

Id. at 421. That statement did not transform this Court's double jeopardy test to an actual evidence test. *Thigpen v. Roberts,* 468 U.S. 27, 39 (1984) (Rehnquist, J., dissenting). *See United States v. Rosenberg,* ____ F.2d ____ (D.C. Cir. Nos. 89-3070, 89-3071 and 89-3072, 11/3/89)

Although the facts in *Vitale* are not outlined in this Court's decision, the facts as presented by counsel do appear in portions of the briefs filed in this Court. The brief filed by the State of Illinois indicated that the State intended to offer evidence at the manslaughter trial other than a mere failure to slow. *Illinois v. Vitale,* Brief for petitioner at pages 4-5; Reply brief for petitioner at page 2. When considered in this light, this Court's use of the term "the" immediately preceding "reckless act" implies that the Court might have been concerned that the underlying act of the prior conviction was *always* an element needed to prove the involuntary manslaughter. Thus, by remanding the matter to the Illinois Supreme Court for further proceedings, the *Vitale* court adhered to the traditional *Blockburger* test.

Moreover, in considering the language used by this Court in *Vitale,* it should be noted that immediately before making the above quoted statement, this Court discussed its rulings in *Brown v. Ohio,* 432 U.S. 161 (1977); *Harris v. Oklahoma,* 433 U.S. 682 (1977) and *In Re Nielsen,* 131 U.S. 176 (1889). None of these holdings is applicable here. In *Brown,* where the petitioner had stolen a car and had been apprehended driving it nine days later, the petitioner had been charged originally with "joy riding." The petitioner pled guilty to that charge and was sentenced. Subsequently he was indicted for the theft of the car. *Brown v. Ohio, supra,* 432 U.S. at 162-63. This Court found that under the *Blockburger* test joy riding and auto theft as defined by the Ohio Court of Appeals were the "same statutory offense" within the meaning of the Double Jeopardy Clause because the lesser offense, joy riding, required no proof beyond that required to convict for the greater offense. *Id.* at 168. Similarly, in *Harris v. Oklahoma,* this Court found that a conviction for the greater crime of felony murder barred a conviction for the lesser crime of robbery with firearms after a conviction for the murder. *Harris v. Oklahoma, supra,* 433 U.S. at 682.

The Court reached this conclusion because:

> [F]or the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense and the robbery as a species of lesser included offense.

Illinois v. Vitale, supra, 447 U.S. at 420. Finally, in *In Re Nielsen* this Court was concerned with prosecutions for unlawful cohabitation and adultery. This Court determined that the elements of unlawful cohabitation were necessary to establish the adultery. *In Re Nielsen, supra,* 131 U.S. at 187. Thus this Court's *Nielsen* ruling which referred to *Morey v. Commonwealth,* 108 Mass. 433, 435 (1871) (the same decision to which the *Blockburger* court referred) appears to stand for the proposition that a lesser-included offense is the "same offense" as the greater. Therefore, *Nielsen* applied the same traditional double jeopardy principles as *Brown v. Ohio, supra,* 432 U.S. 161; *Nielsen* did not establish a "same evidence" test. *United States v. Rosenberg, supra,* ____ F.2d ____ (D.C. Cir. Nos. 89-3070, 89-3071 and 89-3072 11/3/89). In sum, in light of these three cases, this Court's use of the phrase "substantial claim of double jeopardy" in *Vitale,* should not be equated with the phrase dispositive claim of double jeopardy.

More recently, in *Garrett v. United States, supra,* 471 U.S. at 790, this Court stated that it has "steadfastly" refused to adopt the "single transaction" view of the Double Jeopardy Clause.[4] A "single transaction" view should not be adopted

[4]The issue raised in the instant case deals with a variation of a problem which appears to recur in the state courts. *See e.g., State v. DeLuca,* 108 N.J. 98, 527 A.2d 1355, *cert. denied* 484 U.S. 944 (1987); *State v. Padilla,* 101 N.M. 58, 678 P.2d 686 (1984), *aff'd,* by an equally divided Court *sub nom. Fugate v. New Mexico,* 470 U.S. 904 (1985).

in this case either. Rather, the statutory analysis of *Blockburger* should be applied.[5] Since Manslaughter in the Second Degree, Criminally Negligent Homicide and Assault in the Third Degree contain different statutory elements than Driving While Intoxicated and Failure to Keep Right, the offenses to which the defendant entered guilty pleas, the homicide and assault prosecutions which would be permitted under New York State Vehicle and Traffic Law Section 1800(d) should be permitted to go forward.

Conclusion

The decision of the New York State Court of Appeals in the case at bar is an erroneous application of the Fifth Amendment Double Jeopardy Clause. Manslaughter in the Second Degree, Criminally Negligent Homicide and Assault in the Third Degree are different offenses than Driving While Intoxicated (in violation of New York State

[5]The *Blockburger* test is generally adequate to determine when two offenses are not "the same offense" for purposes of the Double Jeopardy Clause. However, as *Blockburger* itself stated, the test applies only "where the *same act or transaction* constitutes a violation of two distinct statutory provisions." *Blockburger v. United States, supra,* 284 U.S. at 304 (emphasis added). Thus, there are cases involving compound-predicate criminal offenses in which simple application of the *Blockburger* test would find one offense to be a greater or lesser included offense of another, but in which successive prosecutions are not barred because the two offenses do not arise from the "same act or transaction." In *Garrett v. United States, supra,* 471 U.S. at 790, the defendant was prosecuted for importation of marijuana and then prosecuted for engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848. Despite the fact that a simple application of *Blockburger* would have rendered the former offense a "lesser included offense" of the latter, the Court expressed "serious doubts" as to whether "the prosecution of the former would bar a prosecution of the latter". The Court counseled "caution against ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation presented in *Brown [v. Ohio,* 432 U.S. 161 (1977),] to the multi-layered conduct both as to time and place, involved in [*Garrett*]." 471 U.S. at 789.

Vehicle and Traffic Law Section 1192, Subdivision 3) and Failure to Keep Right. It devalues the double jeopardy clause to permit a defendant to plead guilty at arraignment to vehicle and traffic offenses and thereby preclude prosecution for homicide and assault when the latter contain different elements than the offenses admitted by the respondent. Moreover, the New York State Court of Appeals' expansive ruling grants the respondent enhanced protection which is not warranted by this Court's previous rulings.

For all the foregoing reasons we ask this Court to reverse the decision of the New York State court of Appeals and remand this case for further appropriate proceedings.

Respectfully submitted,

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PETITIONER'S APPENDIX.

Constitutional and Statutory Provisions Involved

Constitutional Provisions:

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions:

New York State Vehicle and Traffic Law Section 125 provides:

> **Motor Vehicles.** Every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven mobility assistance devices operated or driven by a person with a disability, (b) vehicles which run only upon rails or tracks, (c) snowmobiles as defined in article forty-seven of this chapter, and (d) all terrain vehicles as defined in article forty-eight-B of this chapter. For the purposes of title four, the term motor vehicle shall exclude fire and police vehicles. For the purposes of titles four and five the term motor vehicles shall exclude farm type tractors and all terrain type vehicles used exclusively for agricultural purposes, or for snow plowing, other than for hire, farm equipment, including self-propelled machines used exclusively in growing, harvesting or handling farm produce, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

New York State Vehicle and Traffic Law Section 1120(a) provides:

> (a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:
>
> 1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

> 2. When overtaking or passing pedestrians, animals or obstructions on the right half of the roadway;
>
> 3. When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;
>
> 4. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or
>
> 5. Upon a roadway restricted to one-way traffic.

New York State Vehicle and Traffic Law Section 1192 (which was in effect on October 3, 1987) provided:

> 1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol. Except as provided in subdivision five-a of this section, a violation of this subdivision shall be a traffic infraction and shall be punishable by a fine of two hundred fifty dollars, or by imprisonment in a penitentiary or county jail for not more than fifteen days, or by both such fine and imprisonment. A person who operates a vehicle in violation of this subdivision after having been convicted of a violation of any subdivision of this section within the preceding five years shall be punished by a fine of not less than three hundred fifty dollars nor more than five hundred dollars, or by imprisonment of not more than thirty days in a penitentiary or county jail or by both such fine and imprisonment. A person who operates a vehicle in

violation of this subdivision after having been convicted two or more times of a violation of any subdivision of this section within the preceding ten years shall be punished by a fine of not less than five hundred dollars nor more than fifteen hundred dollars, or by imprisonment of not more than ninety days in a penitentiary or county jail or by both such fine and imprisonment.

2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vehicle while he is in an intoxicated condition.

4. No person shall operate a motor vehicle while his ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

5. Except as provided in subdivision five-a of this section, a violation of subdivision two, three or four of this section shall be a misdemeanor and shall be punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not less than three hundred fifty dollars nor more than five hundred dollars, or by both such fine and imprisonment. A person who operates a vehicle in violation of subdivision two, three or four of this section after having been convicted of a violation of subdivision two, three or four of this section, or of driving while intoxicated, or of driving while his or her ability is impaired by the use of drugs, within the

preceding ten years, shall be guilty of a felony, and shall be punished by a fine of not less than five hundred dollars and such other penalties as are provided in the penal law.

5-a. (a) A violation of subdivision one, two, three or four of this section wherein the violator is operating an omnibus as defined in section one hundred twenty-six of this chapter, taxicab as defined in section one hundred forty-eight-a of this chapter, or livery as defined in section one hundred twenty-one-e of this chapter, and such omnibus, taxicab or livery is carrying a passenger for compensation, or a school bus as defined in section one hundred forty-two of this chapter, carrying a passenger shall be a misdemeanor punishable by a fine of not less than five hundred dollars nor more than fifteen hundred dollars and such other penalties as are provided in the penal law.

(b) A violation of subdivision one, two, three or four of this section wherein the violator is operating a truck over eighteen thousand pounds, a motor vehicle carrying hazardous materials, as defined in section three hundred eight of this chapter, for commercial purposes, or any motor vehicle registered or registrable under schedule F of subdivision seven of section four hundred one of this chapter shall be a misdemeanor punishable by a fine of not less than five hundred dollars nor more than fifteen hundred dollars and such other penalties as are provided in the penal law.

(c) A person who operates a vehicle in violation of any provision of this section which is punishable as provided in paragraph (a) or (b) of this subdivision after having been convicted of a violation of this

section and penalized under paragraph (a) or (b) of this subdivision within the preceding ten years, shall be guilty of a felony, and shall be punishable by a fine of not less than one thousand dollars nor more than five thousand dollars and such other penalties as are provided in the penal law.

(d) Nothing contained in this subdivision shall prohibit the imposition of a charge of any other felony set forth in this or any other provision of the law for any acts arising out of the same incident.

(e) The sentences required to be imposed by paragraph (a), (b) or (c) of this subdivision shall be imposed notwithstanding any contrary provision of this chapter or the penal law; provided, however, that if the district attorney upon reviewing the available evidence determines that the sentence which would be mandated by paragraph (a), (b) or (c) of this subdivision is not warranted, he may set forth upon the record the basis for such determination and consent to a disposition by plea of guilty to another charge in satisfaction of such charge, and the court may accept such plea.

6. Notwithstanding any provision of the penal law, no judge or magistrate shall impose a sentence of unconditional discharge for a violation of any subdivision of this section nor shall he impose a sentence of conditional discharge or probation unless such conditional discharge or probation is accompanied by a sentence of a fine as provided in this section.

7. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of

a violation of subdivision one of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to section five hundred ten of this chapter; provided, however, that such conduct, had it occurred in this state, would have constituted a violation of any of the provisions of this section.

8. The provisions of this section shall apply to the places listed in subdivision (a) of section eleven hundred of this chapter, except that for the purposes of this section "parking lot" shall mean any area or areas of private property, including a driveway, near or contiguous to and provided in connection with premises and used as a means of access to and egress from a public highway to such premises and having a capacity for the parking of four or more motor vehicles. The provisions of this section shall not apply to any area or areas of private property comprising all or part of property on which is situated a one or two family residence.

New York State Vehicle and Traffic Law Section 1800(d) provides:

A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motorcycle.

New York State Penal Law Section 10.00 (9) provides:

"Physical injury" means impairment of physical condition or substantial pain.

New York State Penal Law Section 15.05 provides:

The following definitions are applicable to this chapter:

1. "Intentionally." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

2. "Knowingly." A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

3. "Recklessly." A person acts recklessly with respect to a result or to a circumstance by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

4. "Criminal negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it

constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

New York State Penal Law Section 120.00 provides: A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

2. He recklessly causes physical injury to another person; or

3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

New York State Penal Law Section 125.10 provides:

A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is a class E felony.

New York State Penal Law Section 125.12 provides:

A person is guilty of vehicular manslaughter in the second degree when he:

(1) commits the crime of criminally negligent homicide as defined in section 125.10, and

(2) causes the death of such other person by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law.

Vehicular manslaughter in the second degree is a class D felony.

New York State Penal Law Section 125.15 provides:

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person; or

2. He commits upon a female an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of Section 125.05; or

3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a Class C felony.

New York State Criminal Procedure Law Section 40.30 provides:

1. Except as otherwise provided in this section, a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial state and a jury has been impaneled and sworn, or, in the case of a trial by the court without a jury, a witness is sworn.

2. Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have been prosecuted for an offense, within the meaning of section 40.20, when:

(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense; or

(b) Such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense.

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its prepleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the

people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.